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No. 98-69

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

SAL TINNERELLO & SONS, INC.
Petitioner,

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

Jerry L. Mitchell, Jr.
BFI Waste Systems of
North America, Inc.
757 N. Eldridge
Houston, TX 77079
(281) 870-7190

Attorney of Record for
Amicus Curiae
BFI Waste Systems of
North America, Inc.

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MOTION OF
BFI WASTE SYSTEMS OF NORTH AMERICA, INC.
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of Sal Tinnerello & Sons, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

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[1] Petitioners have consented to this *amicus* brief. Counsel for Respondents has informed undersigned counsel of record that he does not oppose the filing of the *amicus* brief.

BFI is one of the nation's largest companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. As a collector and transporter of solid wastes, BFI is subject to solid waste "flow control" programs and requirements that were developed subsequent to and despite this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In addition, BFI operates 99 landfills in the United States that are or can be adversely affected by the implementation of post-*Carbone* economic flow control schemes such as the one at issue in this case.

BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by the Respondents in this case. With all due respect to the parties to this case, BFI believes that its broad, national experience and the perspective it has gained from that experience will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

Respectfully submitted,

Jerry L. Mitchell, Jr.
BFI Waste Systems of
North America, Inc.
757 N. Eldridge
Houston, TX 77079
(281) 870-7190

Attorney of Record for
Amicus Curiae
BFI Waste Systems of
North America, Inc.

August 3, 1998

No. 98-69

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

SAL TINNERELLO & SONS, INC.

Petitioner,

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the questions presented in the Petition for Writ of Certiorari. In the interest of judicial economy, those questions are not repeated here.

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INTEREST OF *AMICUS CURIAE*

BFI Waste Systems of North America, Inc. ("BFI") is one of the largest companies in the world which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical and residential solid wastes. BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). BFI has become subject to or threatened with the imposition of franchise or municipal contract-based programs, as described below, similar to the approach implemented by the Town of Stonington, Connecticut ("Stonington").[1]

REASONS FOR GRANTING THE WRIT

Since *Carbone* local governments have in several instances attempted to circumvent this Court's ruling by requiring solid waste haulers to sign contracts obligating them to dispose of collected wastes at designated facilities, as an alternative to denial of a necessary license or permit to operate. Similarly, some jurisdictions have mandated that waste haulers abide by "economic flow control" programs on the basis that such regimes are beyond the scope of the *Carbone* holding. This case presents an unambiguous effort to avoid the clear implications of the *Carbone* decision. In this instance, competition in the waste collection and disposal marketplaces was effectively eliminated. Other jurisdictions outside of Connecticut have taken the same approach, or are considering similar programs. Such schemes adversely affect

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[1] This brief has been authored entirely by counsel for *amicus* BFI, and no other person or entity has made any monetary contribution to its preparation or submission.

commerce and prevent the efficient and environmentally protective disposal of solid waste.

I. THE STONINGTON ORDINANCE/CONTRACT SCHEME IS MERELY ONE EXAMPLE OF NUMEROUS ACTIONS UNDERTAKEN SUBSEQUENT TO THIS COURT'S HOLDING IN *CARBONE* THAT HAVE BALKANIZED THE MOVEMENT OF WASTE AND DISRUPTED IMPORTANT REGIONAL MARKETS FOR SOLID WASTE MANAGEMENT SERVICES.

In *Carbone* this Court held that a flow control ordinance adopted by Clarkstown, New York violated the Commerce Clause. By enacting an ordinance precluding the collection of refuse by entities that have not entered into a contract with the township, and by conditioning the award of collection contracts on the waste hauler's agreement that it will deliver waste to a specific facility, Stonington effectively achieved flow control notwithstanding *Carbone*. In affirming this scheme, the District Court apparently concluded, and the Second Circuit apparently agreed, that this Court's ruling in *Carbone* was strictly limited to instances in which the waste hauler is precluded from delivering collected materials to an out-of-state facility by a licensing ordinance. Unfortunately, Stonington's attempt to interpret *Carbone* in a narrow fashion, so as to justify the retention of its flow control mandates and programs, is far from an isolated case.

Whether by "as enforced" or truly "bifurcated" flow control ordinances that prohibit the delivery of waste to alternative in-state facilities, de facto flow control schemes such as so-called "market participant" franchise requirements that are essentially regulatory licensing programs, or "economic flow control" programs that create no "legal" obligation to use a preferred facility yet impose an economic

disincentive to go elsewhere, a number of local governments have sought to undermine the *Carbone* holding through new or modified flow control requirements. John H. Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone And Its Progeny*, 7 Vill. Envt. L.J. 203 (1996).

The decision below--particularly by ignoring the obvious protectionist purpose of the regulatory scheme and the implications of the Petitioner's Contract Clause claim--will likely encourage the implementation of similar programs in other jurisdictions.[2] As this Court is well aware, flow control measures, whether directly imposed as in *Carbone* or as implemented "through the back door", have serious, adverse consequences.

The proliferation of flow control requirements has lead to an increased number of inefficient and non-cost-effective facilities. Regional intergovernmental cooperation and the development of truly regional landfills have, for the most part, not occurred. If every municipality or county decided to site its

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[2] Several jurisdictions outside the Second Circuit have contended that this Court's denials of certiorari in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) and in *USA Recycling, Inc. v. Town of Babylon, New York*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996), immunize from Commerce Clause scrutiny franchise ordinances whose waste delivery provisions are essentially nonnegotiable, even though the resulting process is virtually identical to flow control mandates created by the type of ordinance invalidated in *Carbone*. Unlike some franchise arrangements, in which the award is either for collection only and the hauler may choose the collection site, or combined collection/disposal franchises in which the hauler and community may negotiate which disposal site(s) is utilized, in these programs the franchisee has "no choice", and must indeed utilize a particular facility as a condition of the franchise. Likewise, some local governments have sought to condition the franchise program by requiring that a waste hauler indicate in the franchise application its "plan for disposal" or otherwise state that it will utilize a preferred disposal facility. In such cases, the Commerce Clause has been violated.

own landfill, recyclery, and composting facility and instituted flow control measures, there would be a great misallocation of resources and an undesirable environmental outcome. In addition, flow control measures often result in a significant "takings" issue, both in the constitutional sense and from the standpoint of fairness. This issue can arise in the context of and affect both public and private facilities that are already in existence. When one jurisdiction establishes flow control, other facilities immediately have current and potential customer assets pulled away that might be critical to the economic viability of the operation.

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide."[3]

Moreover, there is no demonstrated correlation between flow control and environmentally protective waste disposal, recycling, or processing. To the contrary,

> . . . by mandating that local waste haulers use particular management facilities, the haulers are prevented from using more environmentally

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[3] National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 1-2. In addition, several of the pre- and post-*Carbone* decisions have noted the significant and artificial economic dislocations created by flow control mandates. *See, e.g., Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1387 (8th Cir. 1993) ($72 per ton disposal fee at designated facility; $30 at nearby facility); *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 916 (3d Cir. 1988) (flow control resulted in $100 per ton disposal charge, as opposed to rates "approximately half" at accessible facilities); *Container Corp. of Carolina v. Mecklenburg County*, No. 3:92 cv-154-MU, 1995 WL 360185 (W.D.N.C. June 22, 1992) ($37.50 per ton/$29.50 per ton).

> sound alternatives that may exist elsewhere. The Sierra Club and other environmental groups have rightly pointed out that such regulations often inhibit the development of alternative waste management options and, in some cases, disrupt preexisting waste recovery and recycling efforts. Flow control laws unnecessarily inhibit the ability of recyclers and other ecological entrepreneurs to compete in the marketplace and provide more economical waste management options. For that reason, and because flow control has frequently been used to finance costly and inefficient incinerators, flow control is opposed by the New York Public Interest Research Group, the National Resources Defense Council, the National Wildlife Federation, Clean Water Action, and Greenpeace, among others. Those groups maintain that in practice it is likely that the environmental costs of flow control outweigh its benefits.[4]

These significant economic and environmental arguments against flow control measures are clearly applicable to most flow control programs--regardless of the method by which they were created. By selecting as the designated site a facility that may not, and all-too-often does not, satisfy best available technology standards, local governments clearly have not sought to promote environmental protection through their flow control mandates. Flow control requirements are typically imposed for economic, not environmental, reasons. And, as the National Solid Wastes Management Association ("NSWMA") demonstrated in a report on flow control programs in Ohio, the requirements adopted by the state's political subdivisions have increased costs to

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[4] Jonathan H. Adler, *The Failure of Flow Control*, 18 Regulation, 1995, No. 2, at 11, 13

generators and transporters of waste without providing any environmental benefit. National Solid Wastes Management Association, *The Effects of Designation and District Fees on Solid Waste Management in Ohio* (1993) at 4, 5. The NSWMA report noted that the selection of certain landfills as "designated" flow controlled facilities means that many tons of wastes are disposed of at less than state-of-the-art facilities. Moreover, the creation of county/district flow control programs in Ohio has significantly reduced inter-county and inter-district waste movements, resulting in a balkanization of the marketplace. *Id.* at 4.

Flow control requirements are illegal, wasteful, and counterproductive. Yet they continue despite this Court's unambiguous ruling in *Carbone*. The Stonington scheme is far from isolated--it is typical of post-*Carbone* efforts to restrict the movement of waste. Such programs and actions balkanize waste movements. They preclude the development of regional disposal solutions, in spite of the U.S. Environmental Protection Agency's view that multi-governmental regional sites are cost-effective and more likely to be managed in an environmentally protective manner. *See* 56 Fed. Reg. 50,978, 50,989 (1991).[5] The decision below threatens the national marketplace in solid waste management by endorsing balkanizations that cannot be squared with the goals of a national economic unit, and with the particular need for the efficient, environmentally protective disposal of solid waste. The petition provides an opportunity for this

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[5] In issuing the Resource Conservation and Recovery Act ("RCRA") "Subtitle D" regulations applicable to municipal solid waste landfills, 40 C.F.R. Part 258, the Agency emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities.")

Court to declare that it meant what it said in *Carbone*--flow control measures violate the Commerce Clause.

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S RULING IN *CARBONE*.

Stonington, by invoking the so-called "market participant" exception to the dormant Commerce Clause,[6] seeks to rely upon the Second Circuit's decisions in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) and *USA Recycling, Inc. v. Town of Babylon, New York*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996). In both cases, the towns actually operated as market regulators, rather than mere participants. Smithtown, for example, implemented its program through a permit process--private waste haulers could not operate within the City in the absence of a permit--the creation of solid waste collection districts and the award of exclusive collection rights within those districts, the imposition of civil and criminal penalties for noncompliance, and a refusal to accept municipal bids from any party that refused to agree to abide by the City's requirements.

Likewise, no private party could have engaged in the anti-competitive behavior exhibited by Stonington without the substantial risk of legal liability. Private parties cannot enact laws and promulgate regulations. They cannot prohibit competitors from operating within particular marketplaces. They cannot create their own enforcement mechanisms to subject competitors to criminal and civil fines. They act for commercial reasons, not public policy ones. The Second

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[6] *See generally* Bruce H. Aber, Note, *State Regulation of Out-of-State Garbage Subject to Dormant Commerce Clause Review and the Market Participant Exception*, 1 Fordham Envtl. L. Rep. 99, 105-08 (1989).

Circuit's approach renders the market participant/regulator distinction unworkable.[7]

There are numerous other deficiencies in the reasoning of the Circuit court in this case. The market participant doctrine is properly limited to instances in which a state participates in a marketplace (without seeking to control it) as a buyer and seller of goods or as a direct employer, not simply as a beneficiary of services that are performed by independent parties (here, waste haulers).[8] The activities of Stonington have an obvious impact on "down-stream" markets, in contravention of this Court's ruling in *South-Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).[9] The clear "fiction" created by

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[7] *See, e.g., Camps/Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1606-07 (1997); *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988).

[8] *See Hughes v. Alexander Scrap*, 426 U.S. 794 (1976); *Reeves v. Stake*, 447 U.S. 429 (1980); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1984).

[9] *See* Randall S. Abate & Mark E. Bennett, *Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation*, 14 Yale J. Reg. 165, 191-92 (1997) (The *Smithtown* "court's conclusion that the town acted as market participant (whose actions are not subject to the Commerce Clause limitations) in contracting for waste disposal services in fulfillment of the objectives of the flow control ordinance is inconsistent with its ruling on the flow control ordinance and sets a bad precedent. The court's holding regarding the waste hauling contracts at issue in [*Smithtown]* allows the town to 'have it both ways' by simultaneously escaping *Carbone* Commerce Clause scrutiny and enjoying antitrust immunity. In essence, what the court precluded the town from pursuing on a broad scale in the form of the flow control ordinance, it enabled the town to undertake on a cumulative, piecemeal basis in the form of the waste hauling contracts. The *[Smithtown]* decision could send a dangerous message to municipalities in the solid waste management field by encouraging them to enter into waste hauling contracts with private contractors as market participants to achieve anticompetitive results. This would allow them to make an 'end run' around what they otherwise would be prohibited from achieving as

application of the market participant doctrine concerns, in part, the fact that local governments that invoke it to defend flow control mandates are, ironically, at the same time asserting that solid waste collection is a traditional governmental function that implicates police power concerns--an inherently regulatory activity. More pragmatically, the type of sweeping reorganization of solid waste collection engaged in by Smithtown, Babylon and Stonington presents a variety of state law,[10] political[11], and economic[12] consequences. Moreover, at least in Smithtown's case, the desired return of waste flows to the chosen facility did not occur.[13]

The Third Circuit Court of Appeals, rejecting application of the market participant doctrine, held in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), cert. denied, 116 S. Ct. 1265 (1996), that the Commerce Clause is applicable

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market regulators."); Note, *SSC Corp. v. Town of Smithtown and USA Recycling, Inc. v. Town of Babylon: Reinvigoration of the Market Participant Exception in the Arena of Municipal Solid Waste Management*, 49 Vand. L. Rev. 753, 782-83 (1996) (casting doubt on the wisdom of the *Smithtown* and *Babylon* decisions in light of antitrust immunity).

[10] *See, e.g., Eads St. Corp. v. Town of Babylon*, 631 N.Y.S.2d 878 (N.Y. App. Div. 1995).

[11] *See* Steve Daniels, *Haulers Sue N.Y. Town*, Waste News, Sept. 1, 1997, at 3 ("Officials in the Long Island, N.Y. town of Babylon allegedly conspired to hand a politically connected group of haulers a lucrative commercial carting contract and then illegally sweetened the deal just before it took effect, two carting companies and three commercial generators charged in a lawsuit. . . . (T)he U.S. Attorney for the Eastern District of New York state, as well as the Suffolk County, N.Y. district attorney's office reportedly are investigating at least some of the allegations"); Bob Brown, *N.J. Haulers Sue Official*, Waste News, Sept. 29, 1997, at 2.

[12] For example, a movement to an exclusive franchise system from "open subscription" means fewer choices for generators and can have the effect of putting smaller waste haulers out of business.

[13] *See* Mary Greczyn, *N.Y. Town Fixes Its Flow*, Waste News, Nov. 3, 1997, at 3.

and that a different standard--an elaborate examination of the totality of the evidence, including evidence of protectionist intent or motivation--applies when the flow control mandate or program results from franchising or competitive contracting for the disposal (rather than the collection, or the collection and disposal) of solid waste.[14] The Third Circuit's insistence upon a searching review of the motivations of the public entity and the components of the bidding and award processes is a significant departure from the type of axiomatic Commerce Clause immunity granted by the Second Circuit. *See also Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without opinion*, 29 F.3d 641 (11th Cir. 1994).

A good example of the proper reach of the Commerce Clause in these cases is found in *Tracy v. Hebron*, No. 4:CV95-3218, slip op. (D. Neb. May 2, 1996). There, the defendant entered into a contract with a landfill that obligated the City to deliver regulated wastes to the facility. The plaintiff, a waste hauler, had a contract with a competing landfill and refused to comply with the terms of the City's contract. In retaliation, the City stated that it would renew the hauler's waste collection license (a mandatory requirement for collection of waste within the City), only on the condition that the hauler deliver waste to the designated facility. When the City ascertained that the hauler was continuing to use the other landfill, it passed a resolution revoking his license. Eventually, the City selected another company as the exclusive franchisee. The court found that the Commerce Clause had been violated.[15]

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[14] The *Harvey & Harvey* test was followed in *Barker Bros. Waste, Inc. v. Dyer County Legislative Body*, 923 F. Supp. 1042 (W.D. Tenn. 1996).

[15] The appropriately narrow reach of the "market participant" exception was noted in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders* (Atlantic Coast I), 45 F.3d 701 (3d Cir. 1995), in which the court emphasized that "(w)hen a public entity

In similar cases, other courts have refused to follow the market participant doctrine. In *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997), a federal district court invalidated a franchise ordinance that required that waste haulers deliver materials to a particular facility as a condition of the franchise. The court reasoned that the market participant doctrine did not save the ordinance from the Commerce Clause and invalidation because a private party could not legally prevent competitors with whom it did not enter into contractual arrangements from operating within a particular area. Likewise, in *Heir's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 353 (Wis. Ct. App. 1997), the Wisconsin Court of Appeals struck down a flow control requirement, rejecting the market participant defense on the ground that "(t)his is not a power that a private party selling processing services could use to require persons to do business with it."

In addition, the Stonington scheme was infected with protectionist motivation. A state or local measure that discriminates against commerce, either on its face or in practical effect, is subject to a strict standard--the discriminatory measure can survive only if it serves a legitimate local purpose and is the least discriminatory alternative to achieve local goals. *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), ("When a state statute. . .discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck

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participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market." *See also Container Corp. of Carolina v. Mecklenburg Co.*, 1995 WL 360185 (W.D.N.C. June 22, 1995); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Authority*, No. 1:CV-93-1318, slip op. (M.D. Pa. Mar. 23, 1995).

down the statute without further inquiry"). Moreover, this Court has also determined that a state or local measure that demonstrates "simple economic protectionism" (*i.e.*, protectionist intent) is also subject to a "virtually per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) at 623-24. If discriminatory intent is shown, a litigant may argue that per se scrutiny, and not *Pike* balancing, is applicable--even if the measure is worded in an "even-handed" fashion.[16] *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).

Even seemingly nondiscriminatory measures have been invalidated pursuant to the more rigorous "virtually per se" test enunciated in *Philadelphia v. New Jersey* and a host of other decisions. Protectionist intent or motivation is, itself, "economic protectionism" and grounds for invalidation of a measure, even if the governmental act is not facially discriminatory. Indeed, a finding of protectionist purpose, motivation, or effect is fatal. *See, e.g., Healy v. The Beer Institute, Inc.*, 109 S. Ct. 2491 (1989) (invalidating a Connecticut beer pricing affirmation statute as "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.") Statutes that evidence protectionism are invalid, even if they neither facially discriminate nor impose, in fact, a disproportionate burden on interstate commerce. *See also Bradley v. Public Utilities Commission*, 289 U.S. 92, 95 (1933); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1927). *Carbone* and its progeny are likewise consistent with the long-held maxim that isolationist or protectionist measures are "*impermissible* under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 685 (1981) (Brennan, J., concurring) (emphasis included).

The overall purpose of the Commerce Clause is, of course, to preclude economic isolation and balkanization. *See*,

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[16] *Pike v. Bruce Church, Inc.*, 397 U.S. 617 (1970).

e.g., *Hughes v. Oklahoma*, supra, 441 U.S. at 325-26 (1979) (the avoidance of "economic Balkanization" was the "central concern" of the framers.); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1110-15 (1986); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1140 (1978). In implementing its system, Stonington expressly desired and anticipated that collected waste volumes would remain subject to the flow control system. By ignoring that evidence, the Second Circuit also ignored this Court's precedents.

III. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES.

All political subdivisions of all of the states of our Union depend upon open borders and a national economy that imposes both benefits and burdens. The Commerce Clause serves to ensure that those borders remain open, and that they not be closed as to some commodities, while open for others. Stonington has made no effort to preclude the importation of seemingly desirable foodstuffs, manufactured goods, service equipment, etc., or the export of other locally-produced goods for sale elsewhere, but for purely economic reasons seeks to prohibit the export of a single commodity--waste.

The post-*Carbone* efforts of local governments to retain existing and impose new flow control mandates and programs despite this Court's ruling are reminiscent of other regrettable episodes in our Nation's history. The authority and duty of this Court to intervene are clear. In the absence of the Court's intercession, political subdivisions and waste management authorities will engage in an unnecessary and counterproductive

war of retaliation--as jurisdictions whose economies are disadvantaged, due to the loss of imported waste volumes, act in kind by precluding the export of their wastes. Very real safety and health threats will result from continued reliance upon older, often substandard disposal sites. The goals of the Congress in enacting RCRA and of the EPA in promulgating the Subtitle D rules will be ill served.

Restrictions on the movement of waste--whether imposed directly or, as here, through the "back door"--affect, indeed, substantially so, the national marketplace by artificially distinguishing between "waste" materials and the open borders that facilitated the transportation, importation, purchase, and consumption of the "original" materials. They deprive companies such as BFI, as well as governments who construct or expand state-of-the-art facilities, the ability to make meaningful long-term investments in disposal capacity and transportation vehicles. They disrupt regional intergovernmental efforts to improve the efficiency and environmental protectiveness of waste disposal. They artificially and dramatically increase the costs of solid waste management. And, perhaps most importantly, they constitute deliberate efforts to circumvent the goals of the Commerce Clause and this Court's numerous opinions. Review by this Court is necessary to ensure that the Commerce Clause's vital role in protecting a truly national economy is not diminished.

IV. REVIEW IS NECESSARY IN ORDER TO ENSURE THAT THE CONTRACT CLAUSE IS NOT REDUCED TO A CONSTITUTIONAL VESTIGE.

The Second Circuit's cursory rejection of Petitioner's Contract Clause argument also justifies this Court's review.

This Court has long held that a state or local statute, ordinance, or regulation may, pursuant to the Contract Clause found in article I, section 10 of the Constitution, not impair "the obligations of Contracts." *See, e.g., Sturges v. Crowninsheild*, 17 U.S. (4 Wheat.) 122 (1819) (a statute cannot effectively prohibit or impair the implementation of a contract in existence as of the time of passage of the requirement). Although the Court has held that the "prohibition against impairing the obligation of contracts is not to be read literally", *Keystone Bituminious Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1249 (1987), when a state or local requirement promotes a "substantial impairment of a contractual relationship", *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), the impairment must be *both* necessary and reasonably designed to promote a valid public purpose. *See also Energy Reserve Group v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 28-32 (1977).

The Stonington scheme seriously impaired the Petitioner's existing contractual obligations--it destroyed the ability of Petitioner to perform the contracts. This Court has never insisted that contract rights be completely destroyed to implicate the Contract Clause--instead, the decisions refer to "substantial impairment". *Allied Structural Steel v. Spannaus*, *supra*, 438 U.S. at 244. Petitioner's contractual agreements were, undoubtedly, substantially impaired Moreover, the Second Circuit ignored this Court's admonition that in order to withstand scrutiny substantial contractual impairment must be *necessary*. The Circuit court's rationale essentially relegates the Contract Clause to a constitutional aberration. Yet this Court has declared that its decisions have hardly "indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory." *United States Trust Co.*, supra, at 25-26. Indeed, "(i)f the Contract Clause is to retain any meaning at all, . . . it must be understood to impose *some* limits upon the power of a State to

abridge existing contractual arrangements, even in the exercise of its otherwise legitimate police power." *Allied Structural Steel, supra*, 438 U.S. at 242 (emphasis in the original).

The Second Circuit's "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because [Stonington's] self-interest is at stake." *United States Trust Co., supra*, 431 U.S. at 26. If states and their political subdivisions can merely point to a listing of purported goals that are then accepted as long as they are rational, the Contract Clause--which reflects the "high value the Framers placed on the protection of private contracts" and the importance that "(o)nce arranged, those [contractual] rights and obligations are binding under the law, and the parties are entitled to rely upon them", *Allied Structural Steel, supra*, 438 U.S. at 245, would be nullified. Flow control requirements are never necessary; there are a variety of non-discriminatory alternatives, such as competition in the marketplace, rather than destruction of it, that are available. The Second Circuit's reasoning allows purely economic "justifications" to trump both the adverse consequences of flow control programs and the unmistakable methods by which communities such as Stonington can respond to this Court's ruling in *Carbone*.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one which impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in *Carbone*, local governments have continued their efforts to create protectionist schemes that thwart the free flow of commerce. The extent of those ongoing disputes, the significance of the environmental and economic

interests implicated, and the need for clear and unequivocal guidance on these issues from this Court all support the grant of certiorari.

Respectfully submitted,

BFI Waste Systems of
North America, Inc.
Jerry L. Mitchell, Jr.
757 N. Eldridge
Houston, TX 77079
(281) 870-7190

Attorney of Record for
Amicus Curiae
BFI Waste Systems of
North America, Inc.

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